Filed 8/21/12 Chapman v. Safeway CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MICHAEL CHAPMAN, Plaintiff and Appellant, v. SAFEWAY, INC. et al., Defendants and Respondents.	2d Civil No. B233760 (Super. Ct. No. 56-2008-00313046-CU-CO-VTA) (Ventura County)

Plaintiff Michael Chapman appeals a judgment after a jury verdict in favor of defendants Safeway, Inc. and Vons (collectively "Employers") on his age discrimination action alleging violation of the Fair Employment and Housing Act (FEHA). (Gov. Code, § 12940 et seq.) We conclude, among other things, that: 1) the trial court was not required to instruct the jury on the *McDonnell Douglas* burden-shifting test, 2) our prior decision reversing summary judgment did not limit the triable issues to a single factual issue, and 3) substantial evidence supports the judgment. We affirm.

FACTS

William Tarter was a district manager in the Employers' supermarket chain. He recommended that Chapman, then 52 years old, be promoted to store manager. In 2005, Chapman managed the Vons Fillmore store and supervised between 80 and 100 employees.

Chapman testified he felt his job might be "in jeopardy" after attending a management meeting where he heard a remark about targeting "the older first tier employees." The Employers rate their store managers' performance. After receiving a disappointing score, Chapman developed "an action plan" for improvement and "brought the score up." He received a "world class service award" and "happy face" awards because of the store's volume of business.

In 2005, Chapman received a poor evaluation. He did not believe he deserved it. In 2006, Tarter told him to "think about" stepping down from his manager position. Chapman submitted personal improvement plans. In April, Tarter gave him an "ultimatum to step down" or face "further discipline." Because he believed "there was no chance . . . to turn this around," Chapman accepted a demotion to a "receiving clerk" job. Tarter said he could not take an assistant manager's position. He told Chapman that Brad Scott, a manager from another store, was demoted, but "Brad was allowed to step down to an assistant manager position . . . . I think you can figure out why." Chapman: "Yeah, I'm old and he's young." Tarter: "Well that's right."

In the defense case, Chapman was asked, "[Y]ou testified to a conversation . . . where Mr. Tarter told you you were too old to be an assistant manager . . . ; is that correct?" Chapman: "I don't believe I said those exact words." Chapman was asked, "Well, at any time did Bill Tarter tell you you were too old to step down to an assistant manager position?" Chapman: "He didn't use those exact words, no."

Tarter testified Chapman performed poorly as a store manager. The store employees gave him a 3.21 performance rating - "an extremely poor score." They said he did not maintain a "neat" store, he isolated himself in his office, he did not attend to problems, and he did not treat employees with respect. Chapman let the employees run the store without supervision and was preoccupied with "his personal problems." He did not interact with the employees and did not exercise management leadership. Tarter tried to assist Chapman by providing improvement guidelines. But he did not follow them.

Tarter inspected the store and found problems with "cleanliness." Chapman did not conduct inspections. There were "crumbs" on the bakery floor. He did not

maintain store "displays," store items were "out of stock," which meant customers would shop elsewhere. His store's performance was poor.

Denia Wheeler, Chapman's assistant manager, testified Chapman was supposed to train her, but "[h]e didn't work with [her]." She said, "He wasn't out on the sales floor." The store received "a poor service score" in 2005. She developed a plan to improve the store's performance, but Chapman frustrated her efforts and "didn't want to participate." The "morale among the staff" was "low."

Kim Gunter, a store employee, testified Chapman "would leave the store to . . . take care of family issues." Wheeler was essentially performing his job. During a meeting Chapman said that "if it were up to him, he would not have women on his management team."

Store employee Cecilia Burns testified, "If you went to [Chapman] with a problem, . . . he wasn't very interested. His mind wasn't there." She said, "There was an indifference towards his female employees. [H]e didn't have the respect for women that he should."

Larry Vanderdoes, Chapman's regional operations supervisor, testified Chapman received "happy face" awards. But they do not "tell the entire story of how well a store is run," the condition of the market, or management leadership. The world class service award is a team award. It does not mean "the manager is doing an acceptable job in every area." Chapman "did not maintain a clean store." The store did not meet the required standards, store merchandise was cluttered, and there was an insufficient supply of produce and meat.

In its special verdict, the jury answered "Yes" to question No. 3, "Did Safeway/Vons force Michael Chapman to step down from his position as store manager?" It answered "No" to question No. 4, "Was Michael Chapman's age a motivating reason for Safeway/Vons to force Michael Chapman to step down from his position as manager?"

DISCUSSION

Jury Instructions

Chapman contends the trial court erred by not giving a jury instruction based on the *McDonnell Douglas* burden-shifting test (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792), which is discussed in *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317. We disagree.

In *Guz*, the court affirmed a summary judgment against a plaintiff who claimed his employment was terminated because of age discrimination in violation of FEHA. The court wrote, "California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination, including age discrimination . . . ." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 354.) Under that "McDonnell Douglas test," the employee must show "(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, [or] demotion . . . and 4) some other circumstance suggests discriminatory motive." (*Id.* at p. 355.) If the employee makes such a showing, this supports a presumption of discrimination. But the employer may "rebut the presumption" by showing it acted for "a legitimate, nondiscriminatory reason." (*Id*. at pp. 355-356.) The employee then has "the opportunity to attack the employer's proffered reasons as pretexts for discrimination . . . ." (*Id*. at p. 356.)

Chapman requested a jury instruction based on the *McDonnell Douglas* test. He claims the trial court erred by not giving it because *Guz* requires it. He notes that in *Guz* the court used the phrase, "If, *at trial*, the plaintiff establishes a prima facie case, a presumption of discrimination arises." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 355.) But language in appellate decisions is not authority for issues that were not decided. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.) The court in *Guz* did not reach the issue of jury instructions. It said, "The Courts of Appeal have pondered how the *McDonnell Douglas* formula should apply, under California law, to an employer's motion for summary judgment . . . ." (*Guz*, at p. 356.)

Courts that have reached this issue have rejected the claim that the *McDonnell Douglas* test must be given as a jury instruction. In *Heard v. Lockheed Missiles & Space Co., Inc*. (1996) 44 Cal.App.4th 1735, 1758-1758, the court wrote, "[T]he *McDonnell Douglas* framework is a burden-shifting tool--not a subject on which the jury should be instructed." In *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201, the court wrote, "[W]hether or not a plaintiff has met his or her prima facie burden, and whether or not the defendant has rebutted the plaintiff's prima facie showing, *are questions of law for the trial court, not questions of fact for the jury*." (Italics added.)

In *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 375, the court wrote that a plaintiff in an employment racial discrimination case "has the burden of proving . . . that the plaintiff's race was a substantial factor in the adverse employment decision." That is the standard the jury must follow. The *McDonnell Douglas* burden-shifting test is "most useful at preliminary stages of litigation, such as summary judgment . . . ." (*Horsford*, at p. 375.) But "[o]nce the case is submitted to the jury . . . *these frameworks drop from the picture* . . . ." (*Ibid*., italics added.)

The trial court followed *Horsford*. It said, citing the jury instruction it used, "Plaintiff[] must prove by a preponderance of the evidence that the plaintiff's age was a substantial and motivating factor in the employment decision, even though other matters may also have contributed to the taking of the action." There was no error.

Law of the Case

Chapman claims that under the law of the case doctrine, the jury verdict must be reversed. He contends the verdict is inconsistent with our prior decision that reversed a summary judgment against him in this case. We disagree.

The law of the case "doctrine applies only to an appellate court's decision on a question of law." (*Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 213.) A reversal of a summary judgment because there are contested issues of fact

requires those issues to be tried. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal,App.4th 832, 839.)

Chapman claims that in *Chapman v. Safeway* (May 24, 2010, B218227), a nonpublished opinion, we concluded that he had established "a presumption of discrimination" that was binding at trial, and that we narrowed the triable issues to "whether [he] was given an ultimatum and forced to write a letter requesting demotion or whether he voluntarily requested it."

But we did not narrow the issues as Chapman suggests. We wrote the "question of whether [Chapman] was wrongfully demoted . . . *is for a trier of fact to decide*." (Italics added.) We did not resolve the age discrimination issue as that was factually contested. (*Binder v. Aetna Life Ins. Co.*, *supra*, 75 Cal.App.4th at pp. 839-840.) We said, "Triable facts exist on whether unfair job performance evaluations were used as a pretext to take unlawful adverse employment action against [Chapman] and force him to take a demotion." We said, "There are disputed facts that [Chapman] was subjected to discriminatory store inspections and job performance evaluations . . . ." There was "a triable issue of fact that respondents' stated reason for placing [Chapman] on an action plan and 'offering' a voluntary demotion was a pretext to unlawfully discriminate." We said, "Summary judgment may not be granted where there are conflicting inferences as to material facts."

Chapman claims we determined that he met the first and third stages of the *McDonnell Douglas* test and this was binding on the jury. That is not the case. We employed that test to determine whether summary judgment was proper and said, "[T]here was sufficient showing of pretext *to survive a summary judgment motion*." (Italics added.) "Once the case is submitted to the jury . . . these [McDonnell Douglas] frameworks drop from the picture . . . ." (*Horsford v. Board of Trustees of California State University*, *supra*, 132 Cal.App.4th at p. 375.) Chapman notes we said he made a showing that he was competently performing his job and he claims this was binding at trial. But in reviewing summary judgment, we had to assume his job performance evidence was true. (*Binder v. Aetna Life Ins. Co.*, *supra*, 75 Cal.App.4th at p. 840.) At

trial, the jury could reject it. Chapman had to prove he was performing competently. (*Guz v. Bechtel National Inc.*, *supra*, 24 Cal.4th at p. 355.)

Chapman notes we said, "[T]he case boils down to whether [Chapman] was given an ultimatum and forced to write a letter requesting a demotion. That is for a trier of fact to decide, not for a trial court on summary judgment." But this was not the only issue for trial as Chapman claims. The language he quotes was not a full summary of the triable issues as shown by the above discussion. The trial court correctly determined the issues that remained to be tried.

Substantial Evidence

Chapman contends the evidence is insufficient to support the judgment. He suggests that in a substantial evidence review we must apply the *McDonnell Douglas* sequential analysis. But "[o]nce the case is submitted to the jury--and, therefore, for substantial-evidence review on appeal--these frameworks drop from the picture and traditional substantial evidence review takes their place in the analysis." (*Horsford v. Board of Trustees of California State University*, *supra*, 132 Cal.App.4th at p. 375.)

Chapman claims defense witnesses lied. But we do not decide credibility. (*Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1647; *Church of Merciful Saviour v. Volunteers of America, Inc.* (1960) 184 Cal.App.2d 851, 856.) We look to the evidence supporting the findings and draw all reasonable inferences to support the judgment. (*Griffith Co. v. San Diego College for Women* (1955) 45 Cal.2d 501, 508.)

Chapman argues that because the jury rejected the Employers' claim that he voluntarily sought a demotion, it had to reject all the defense evidence. But the trier of fact decides which evidence it will accept or reject. (*San Gabriel Valley Water Co. v. City of Montebello* (1978) 84 Cal.App.3d 757, 765.) The jury rejected Chapman's claim that he was a victim of age discrimination.

There is substantial evidence to support the judgment. From the testimony of Tarter, Wheeler, Gunter, Burns, and Vanderdoes, a trier of fact could reasonably infer that Chapman performed poorly as a store manager, he did not supervise the employees, and he ignored problems they brought to his attention. Employees complained about his

conduct. Employee morale was low. He did not conduct inspections, store items were out of stock, he did not maintain displays, and he took no management leadership. He isolated himself and left the store to take care of personal business. Wheeler assumed some of his duties because Chapman was preoccupied with other matters. Witnesses testified about his problems working with female employees. Chapman did not train the assistant manager and frustrated her efforts to improve the store. The store was maintained in a substandard manner. Tarter tried to assist Chapman by giving him guidelines for improvement, but Chapman did not improve.

Moreover, jurors could reject Chapman's claim that Tarter said he was too old to be an assistant manager because when called by the defense, Chapman essentially withdrew that accusation. His claim that the Employers were opposed to hiring older managers was refuted by evidence they hired managers in their 60's and late 50's. Chapman was 52 when he was promoted to manager.

The judgment is affirmed. Costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Frederick H. Bysshe, Judge

Superior Court County of Ventura

Daniels, Fine, Israel, Schonbuch & Lebovits, Moses Lebovits, Anna L. Knafo for Plaintiff and Appellant.

Littler Mendelson, P.C., Bren K. Thomas, Ryan L. Eddings for Defendants and Respondents.